THE COMPARATIVE RESULTS, IN THE ADVANCEMENT OF PRIVATE INTERNATIONAL LAW, OF THE MONTEVIDEO CONGRESS OF 1888-9 AND THE HAGUE CONFERENCES OF 1893, 1894, 1900, AND 1904.

BY SIMEON E. BALDWIN, LL.D.,

NEW HAVEN, CONN.

Public international law has been sarcastically defined as "a compound of ethics, etiquette, and fraud, administered by armies and navies." If in England and the United States it has ever worn such an appearance, this belied what with them is its real character. Their all-embracing common law has made both public and private international law a part of itself, to be administered, precisely as municipal law is, by the courts whenever a question turning upon their acknowledged rules may come up for judicial determination.[1]

But what are these acknowledged rules? To too large an extent they are what the judges, who may be trying a particular case, choose to recognize as generally established and resting on right reason. This is in accordance with the genius of Anglo-American law. It is foreign to the spirit of that which is preferred by the civilized world in general. Most nations choose to express all their laws through the voice of their legislatures. They publish them in the form of codes. A natural step for them to take next is to publish in like form and by like authority such rules of public and private international law as they may deem worthy of recognition and enforcement. But here the "like authority" is not the legislative power of any single government. International law is for all governments. It ought, therefore, to have the formal approval of all. Hence any official codification will naturally take the form first of a treaty or convention between several

[1] Triquet v. Bath, 3 Burr., 1480; In re Martin, L. R. Appeal Cases, 1900, Probate, 211; Moultrie v. Hunt, 23 N. Y., 394.

nations, owning contiguous territory, or connected by common interests. Such conventions, when ratified by the law-making power in each, will be the act of that power, as fully as if emanating from it in the first instance, and will be virtually a legislative code for each and all.

Within the last twenty years there have been three marked instances of codification of this description. One, in the field of public international law, embodied in the three Conventions agreed to at The Hague in 1899, is familiar to all. Two others have attracted less public attention, because dealing wholly or mainly with matters of private international law. Of these, one proceeded from a Congress of seven South American States and the other from a Conference of twice that number of European powers.

No field of political science is explored with more difficulty than that which belongs to private international law. Public international law has at least some boundaries and monuments that are well known and universally recognized. A common court of the world has now been set up to administer it. But private international law can hardly look for the establishment of such a tribunal to protect its integrity. Modern government proceeds from the consent of the governed. Nations may agree to contribute to the support and to respect the judgments of the Hague Tribunal, because only national interests will come before it. Private individuals can become parties to no such agreement. The only legitimate courts for them are those which deal with private rights, and are part of a government established by a particular people for their own good. It is only rights enforceable in such courts with which private international law has to do. It is, nevertheless, a branch of science, and of a science which, above all others, is important to mankind. Its scientific character requires that it should deal with universal conceptions and deal with them in a settled form and order. This it is theoretically possible to achieve in two ways.

1. There may be a common agreement on certain rules of judgment to be applied in all courts throughout the world in the disposition of all controversies of a similar nature as to matters of private international law.

2. There may be a common agreement to determine which of two or more differing rules of judgment shall govern the disposition of certain controversies as to matters of private international law, according to their particular nature and origin, as the case may be.

In other words, private international law may either seek to lay down universal rules which are the same in every country, or, acknowledging that this is impossible, may content itself by determining which of several conflicting rules, each having the sanction of a particular nation, shall be applied in giving remedial relief under the particular circumstances of a particular class of causes.

The idealist will think the former of these methods the only one deserving the name of scientific. The opportunist will be ready to accept the other, at least for the present stage of the progress of the world; remembering that the principle of accommodation is yet a principle.

Of the two efforts in recent years to advance private international law which have been described as made in different quarters of the globe, one was inspired by a primary, though not unlimited, devotion to the first method; the other moved on the lines of the second.

Early in 1888, the Argentine Republic and Uruguay concurred in issuing separate but simultaneous invitations to all the other South American republics to unite in holding at Montevideo in the following August an international judicial congress. Its special object was to be the prevention of conflicts of laws which might "prejudice the free development of the reciprocal relations of the South American States."

At the appointed time, delegates appeared from the governments of all these states except Columbia, Ecuador, and Venezuela. The Congress sat until the following February, and approved eight draft-treaties on the following subjects: civil law, commercial law, penal law, the law of procedure, literary and artistic property, trade-marks, patents, and the exercise of the liberal professions. An additional protocol was also agreed on, containing various special provisions as to the application of the laws of each of the contracting parties

in the territories of the rest. These projects were approved *ad referendum*, there being still required in the case of each of them, in order to give it effect in and between any of the powers, ratification first by the legislative department of each, and then by the department of government charged with the management of foreign relations.[2]

Each treaty contained provisions looking to the adhesion to it of nations not invited to the Congress, as well as of the three which were invited, but did not send delegates. These provisions were not very clearly worded, but as explained by the terms of the final protocol seem to authorize (at least upon the invitation of the Argentine Republic and Uruguay), the adhesion of any power to any of the treaties, provided, and provided only, such adhesion should be acceptable to each of the powers which had participated in the Congress, and which might subsequently ratify the treaty in question.

In fact, communications were sent by the Argentine Republic and Uruguay to other powers, outside of South America, inviting their adhesion.[3] Spain was one of these, and on November 9, 1893, through her department of foreign affairs, signified to Uruguay her acceptance *ad referendum* of this invitation.[4]

The parliamentary action necessary to make the treaties operative, up to December 11, 1894, had been had in four countries, Uruguay, Peru, Paraguay, and the Argentine Republic; such ratifications on the part of each having been given in the order named.[5] Ecuador followed in 1902, and Bolivia in 1903.[6] Chili refused to ratify at least two of them, those on Penal Law and Civil Law.[7] Brazil declined to ratify the

[2] Torres-Campos, *Bases de Una Legislación sobre Extraterritorialidad*, 221.

[3] Reports, etc., of the International American Conference of 1889, 568.

[4] Torres-Campos, *op. cit.*, 338. The necessary action by the Cortes has not been secured, and probably never will be.

[5] *Ibid.*, 344, 235.

[6] Doc. No. 310, 57th Congress, 2d session, 804; Doc. No. 458, 58th Congress, 2d session, 559.

[7] Reports, etc., of the International American Conference, 596, 907.

latter.[8] Guatemala, in 1903, approved those on procedure, copyrights, trade-marks, and patents.[9]

The four Conferences of the Hague were initiated by Holland in 1892, by which government the subjects for consideration at each of them were carefully restricted and defined. At the first, held in 1893, official delegates were present from Holland, Germany, Austro-Hungary, Belgium, Denmark, Spain, France, Italy, Luxembourg, Portugal, Roumania, Russia, and Switzerland. At the second and third, held respectively in 1894 and 1900, these powers were again represented, and also Sweden and Norway. At the fourth, held in 1904, a delegate was present from Japan, and signed the final protocol.

The Conference of 1893 agreed on tentative projects of laws or treaties, on four subjects: the constitution of marriage; the transmission and authentication of documents; commissions for taking testimony; and successions. The second reconsidered these, and agreed on a protocol for submitting to the several powers represented a project for rules on six subjects: the constitution and effects of marriage; divorce and separation; guardianships; civil procedure, embracing the points covered by the second and third projects of the preceding year; bankruptcies; and successions.

In most of the countries taking part in these Conferences parliamentary ratification is required before any such convention can become operative. In 1899 (April 27), such action having been secured wherever it was necessary, the convention as to civil procedure went into effect between all the powers, subject to a reservation by Italy on a single point (the *cautio judicatum solvi*).[10]

At the third Conference, held in 1900, the other conventions were reconsidered and revised, draft conventions agreed to by twelve of the powers represented,[11] on four subjects: the

[8] *Annuaire de Législation Étrangère*, 1890, 1003.

[9] *House Doc.*, No. 310, 57th Congress, 2d session, 840.

[10] *Actes de la Troisième Conférence de la Haye, pour le Droit International Privé*, 78.

[11] I count Sweden as one of the powers, and not Norway.

constitution of marriage; divorce and separation; guardianship; and successions.

Of these, the conventions as to the constitution of marriage, divorce and separation, and guardianship received parliamentary approval in seven countries, being a majority of those which had given their consent at the Conference, and went into full effect in 1904 (Aug. 1),[12] as between these, namely, Germany, France, Sweden, Holland, Belgium, Roumania, and Luxembourg. Spain joined them a few weeks later, and Switzerland and Italy in July, 1905.[13]

By the fourth Conference certain amendments were recommended in the convention on civil procedure, and revised conventions adopted on four subjects: the relations between husband and wife, established by marriage; bankruptcies; successions; and lunatics.[14]

We have, then, an agreement fully established between six nations of South America for regulating most questions of private international law that can arise in their courts.

We have also an agreement, established in 1899, between fourteen European nations for regulating as to their judicial tribunals the proof of foreign documents; the execution of rogatory commissions (by which the courts of one country render assistance to those of another); suits by foreigners *in forma pauperis;* and the arrest of foreigners on civil process; and also an agreement between all but one of these nations that foreigners may sue without giving any security to the defendant for his costs of suit, whenever none is required from native citizens, but that any judgment for costs against the plaintiff in such a suit may be enforced (*i. e.,* rendered *exécutoire*) in any other of the countries which are parties to the convention.

[12] *Mitteilungen der Internationalen Vereinigung für vergleichende Rechtswissenschaft,* etc., for 1905 (No. 24), 477.

[13] *Journal du Droit International Privé,* 1905, 797, 1151. These conventions are printed in the Appendix to the Report of the Proceedings of the Universal Congress of Lawyers and Jurists, held at St. Louis in 1904.

[14] *Actes de la Quatrième Conférence de la Haye pour le Droit International Privé,* 224.

We have further an agreement, established in 1904 and 1905, between ten European nations for regulating most questions of private international law that can arise in their courts concerning the constitution of marriage; divorce and separation after marriage; and guardianships. It seems probable that Austro-Hungary and Portugal will also give their adhesion to it.[15]

The South American conventions are to remain in force indefinitely, subject to the right of any signatory power to withdraw on two years' notice. Each of the European conventions runs till the end of five years from the date when a majority of the powers, agreeing to its proposition, made a formal deposit of their respective ratifications at the Hague;[16] but at the expiration of that time it is to be deemed to be tacitly renewed from five years to five years, subject to denunciation by any power, on six months' notice, as to its own obligations under it. In this way the Hague convention as to civil procedure is now in force for its second term.

Let us now ask, what are the main differences between the work of the Congress of Montevideo and that of the Conferences at the Hague?

The former had more ambitious aims.

It commenced its labors under the inspiration of a project for a general code of private international law, prepared by Dr. D. Gonzalo Ramirèz, the minister of Uruguay at Buenos Ayres, at whose instance Uruguay and the Argentine Republic had been induced to call it together.[17] This project was based on the principle that to claim the benefit of private law is a right of humanity, and the common patrimony of all men.[18] Nationality, therefore, it was argued, rules political,

[15] *Proceedings of the Universal Congress of Lawyers and Jurists at St. Louis*, 145.

[16] As it was to take effect 60 days after such deposit, it can only run for four years and ten months as respects its first term.

[17] Torres-Campos, *op. cit.*, 208, 219; International American Conference Reports, etc., 74.

[18] *Cf.* Art. 8 of the Italian Civil Code; and Fiore, *Droit Int. Privé*, I, § 104.

but not civil rights. The Congress of Jurisconsults at Lima in 1877 had proceeded on another theory. It had accepted nationality as the criterion of personal status and capacity. The code which it proposed had, therefore, fallen by the way. Modern European jurists were treading in the same path. They were for making the civil laws as to a man's juridical relations follow his national law, wherever he might go, as well in regard to his purely personal relations as to those affecting his property, even if situated in a foreign territory. This was opposed to the doctrine of Anglo-American jurisprudence and to the spirit of the South American Constitutions.

The Ramirèz code consisted of 101 articles, followed by a commentary justifying the principles upon which it was framed. It was originally prepared as the basis of a treaty between Uruguay and the Argentine Republic only, but made for itself a wider sphere.

The original memorandum submitted by the government of the Netherlands to the delegates accredited to the first Conference at the Hague in 1893 had, on the other hand, a much more restricted scope. It referred to the work of the Congress of Montevideo as more comprehensive than that which they were invited to undertake. This was simply, at the outset, to endeavor to reach an agreement on certain general principles in respect to a few selected subjects.

The opening address of the President (Dr. T. M. C. Asser) set forth this as the proper aim of the Conference with great plainness. We shall not, he said, aspire to the general unification of private law. On the contrary, it is precisely the diversity of national laws which makes the necessity felt of a uniform solution of international conflicts. "Unification is neither possible nor desirable, save for certain kinds of laws of a character essentially cosmopolitan."

The Conferences at the Hague all proceeded on the lines thus indicated, and there was scarcely an allusion to the South American conventions in any of their discussions or reports.

Time will serve to note but a few of the differences in the conclusions of these bodies.

By the Hague conventions personal status generally follows nationality. By the Montevideo conventions, it generally follows domicil. It is needless to remark that so far as this difference is concerned, the latter accords better with the principles of Anglo-American law.

It may, however, well be doubted if those principles are in their nature permanent.

The political, like the economic tendencies of our times, set strongly towards consolidation and centralization. Italy has pressed the rule of nationality as against that of domicil, because she was busy in creating a nation with a strong central authority. Germany has followed her lead from a similar cause. The waning of the power of our own States, as the people of the United States are becoming more closely knitted together by the bonds of commercial intercourse and the pressure of world-politics, makes in the same direction. So for Great Britain does the rapid extension of her imperial policy.

But the Montevideo conventions are not altogether consistent in this respect. Take, for instance, the provisions as to the constitution of marriage. Title IV of the treaty on International Civil Law relates to marriage and divorce, and seeks to cover the entire field in three brief articles.

By Art. 11, which treats of the constitution of marriage, the capacity to contract it, as well as its formalities, continuance, and validity are to be governed by the law of the place where the contract is entered into; saving only exceptions from want of age, near relationship, prior subsisting marriage, and the killing by either party of one to whom the other had been previously married, in order to free the latter from the bond of matrimony.

Here the *lex domicilii* plays no part, nor does nationality. Art. 13, however, provides that the law of the matrimonial domicil shall govern as to the legal separation of the couple, and as to divorce, provided the grounds of divorce be sufficient under the law of the place where the marriage took place

The Hague convention on the constitution of marriage alone covers eight articles. While it agrees with the Montevideo convention in letting the *lex loci celebrationis* regulate the

form of marriage, it saves the rights (1) of the nation to which the parties belong, to refuse to recognize it, unless the requirements of its own laws have been also observed, and (2) of all nations to recognize it if, though null in the place of celebration, it was solemnized in a form sufficient by the national laws to which each party was subject. It also recognizes marriages of foreigners according to the forms of their own law, at a legation or consulate, in a country that makes no opposition. Nor can such opposition be of avail if founded on the insufficiency of a previous divorce of one of the parties, or on ecclesiastical vows. On the other hand, if the law of the nation to which the parties belong forbids their marriage on purely religious grounds, but the *lex loci celebrationis* nevertheless permits it, the marriage will be good there, and in such other of the signatory powers as may choose to recognize it. What their national law is, parties intending marriage are bound first to prove to the satisfaction of the authorities of the place of celebration.

In contrast with the single article which has been described in the Montevideo convention regulating divorce and separation, one of the Hague conventions is entirely devoted to the subject. It contains nine articles, and follows the former in requiring grounds for a divorce which are recognized as sufficient by the law of more than one country. The Montevideo convention calls for grounds so recognized both by the law of the matrimonial domicil and by that of the place where the marriage took place. The Hague convention calls for grounds recognized both by the *lex fori* and by that of the nation or nations to which the parties belong, unless the former treats the authority of the latter alone as sufficient.

The ignoring of the *lex fori* which marks the Montevideo convention seems plainly an element of weakness. To dissolve a relation of such social importance as that of marriage is what no state should be called upon to do, unless its own law justifies such relief under similar circumstances.

The great and vital distinction between the Montevideo and the Hague conventions is that the former aims at dealing shortly with universals, while the latter is content to deal spe-

cifically with particulars. The Latin-American love for legal generalization showed itself even more strongly in the convention adopted by the second Pan-American Congress of Mexico in 1902, looking to the immediate and complete codification of both public and private international law.[19] Brazil was the first to propose this, and the Bolivian parliament ratified the convention in 1903.[20] I am informed by the Secretary of State of the United States that Honduras did the same, but no other powers gave their adhesion to it, and the convention has therefore lapsed.

Universal propositions are apt to require universal exceptions. The general protocol which closed the list of the Montevideo conventions provides (Art. IV) that the laws of other states shall never be enforced as against the political institutions, police regulations, or customs entering into the *lex fori*. This certainly opens a wide door of relief from affirmations of general principles, the application of which might be found inconvenient in practice.

The South American courts, in expounding these conventions, have been inclined to give full force to all their exceptions and limitations, even if they have not added to them by construction. Let me close this paper by mentioning a single instance of this practice which well illustrates it.

A lawyer in Buenos Ayres, Señor Lamarca, retained by the New York Life Insurance Company to defend a suit upon a policy, satisfied himself that it had been fraudulently issued, and through improper and criminal practice on the part of a certain insurance solicitor in Montevideo, named Castro. Thereupon he filed a complaint in a criminal court in the latter city, as attorney for the company, charging Castro with this offence. By the law of Uruguay, no lawyer can act for a client as attorney of record without a written power of attorney. Señor Lamarca had none authorizing him to institute such a prosecution, nor was the company aware of his action in this respect. Señor Castro made defense and was acquitted.

[19] *Senate Doc. 330*, 57th Congress, 1st session, 203; *Report of the Proceedings of the Congress*, Mexico, 1902, 147.

[20] *Doc. 458*, 58th Congress, 2d session, 559.

He then procured the institution against his accusers, including the New York Life Insurance Company among them, of civil and penal actions, demanding £250,000 damages for the injury which had been done him by their false charges. Uruguay follows the European practice of allowing a demand for damages in favor of the party injured by an offence to be joined with a criminal complaint.[21] An appearance was entered for the company in defense to the claim for damages, but again without any written power of attorney. Judgment was rendered in December, 1900, condemning Señor Lamarca to six months' imprisonment, and declaring the company liable for such damages as might be assessed by arbitrators according to law. They were then assessed by arbitrators, as is the practice there, after hearing the company (which then appeared by an attorney holding a written power), at the full amount claimed, with costs, including counsel fees.

The company had a branch office in Montevideo. Payment of the judgment having been refused there, proceedings in insolvency were instituted against it, and a decree of adjudication obtained, notwithstanding a law which provided that such proceedings could only be brought by one holding a commercial obligation. Señor Castro then made over his claim to a syndicate, which undertook its enforcement for its own profit.

By the treaty of Montevideo as to procedure, judgments and awards of arbitrators in civil and commercial matters, rendered in one of the signatory powers have in the territory of any other the same force as in the territory of the former, provided they were (a) rendered by a tribunal competent under the principles of international law (*dans l'ordre international*); (b) were final; (c) the defendant having been legally summoned, or represented, or regularly declared in default; and (d) were not contrary to the laws of public order in the country where their enforcement might be sought. Article IX required the due execution of rogatory commissions for the performance of any acts required by any of the treaty provisions.

[21] See the French *Code d'Instruction Criminelle*, Arts. 6, 358, etc.

The companion treaty as to international commercial law provided that one might be adjudged an insolvent wherever he had a commercial domicil, though incidentally carrying on business in any other nation, or maintaining agencies or branch offices there which did business on the account and credit of the principal house; and if there should be two or more independent commercial houses in different countries, the courts of each were to have jurisdiction in insolvency over the house maintained there.

The syndicate, relying on these treaties, asked and obtained rogatory commissions from the judges of Uruguay to those of the Argentine Republic for the institution of three suits; one to sequester the property of the company's branch office at Buenos Ayres; the second, to sequester a public deposit of securities which it had made there with the government for the protection of creditors; the third, to compel payment by the branch office of counsel fees, amounting to 30,000 piastres, taxed against the company in the Montevideo judgment.

The two commissions first named were presented to the court of commerce of Buenos Ayres, which responded by issuing writs of sequestration founded on the Montevideo adjudication in insolvency, both against the local branch office and the public deposits.

The third commission was presented to one of the Federal judges, who declined to interfere for the enforcement of the judgment for counsel fees, on the ground that the treaty had no reference to judgments rendered in the course of any criminal proceeding.

This ruling was affirmed on appeal, but appeals from the judgments of the court of commerce were sustained, the higher courts holding that the only commercial domicil of the insurance company was in New York; its branch offices in Montevideo and Buenos Ayres being simply agencies and not independent commercial houses.

By thus looking into the foundations of the Uruguayan judgments, the Argentine courts read into the treaty of Montevideo a rule that a judgment rendered in one of the signatory governments could only be enforced in another by virtue of

an order from a judicial tribunal of the latter, in the nature of an *exequatur* or a decree of homologation.[22]

It would seem that the award of $1,250,000 against the insurance company must have been grossly excessive. Nevertheless it was made in a proceeding to which the company was regularly a party, and in which it had been duly heard. The rogatory commissions seeking its enforcement were also regularly issued. The treaty of Montevideo, taken literally, would seem to entitle the syndicate to collect its judgments by the aid of the Argentine courts. But the mode of collection pursued was through proceedings in insolvency, and here a jurisdictional question fairly arose. If the company had no commercial domicil in Uruguay, the courts of that country had no power to adjudge it an insolvent debtor.

The Hague Conferences provided in their convention as to insolvency procedure, that an adjudication in insolvency in one of the contracting nations could not be enforced in another without a formal *exequatur*, and set out in particular what must be shown to obtain one. The conditions of the *exequatur* which the ruling of the Argentine courts requires are necessarily left to be settled by the general principles of jurisprudence recognized in the country from whose courts the enforcement of the judgment is sought. Only such of those principles certainly as seem essential to international justice should be applied.

It is worthy of remark that several years after her adhesion to the treaty of Montevideo, the Argentine Republic (May 29, 1901), concluded a treaty with Italy as to rogatory commissions and foreign judgments, much more on the lines of the Hague Convention. By this, judgments of the courts of either power are to be enforced in the other only upon an *exequatur*, to be granted if, and only if, (1) the court was one of competent jurisdiction; (2) the parties were properly cited, or voluntarily appeared; and (3) the judgment rested on a personal obligation, or one not contrary to the law or

[22] See a discussion by Professor E. S. Zeballos, of the University of Buenos Ayres, in the *Bulletin Argentin de Droit International Privé*, I, 341.

inimical to the public order of the nation where the *exequatur* is sought.[23]

DISCUSSION.

ARTHUR K. KUHN: There are some broader aspects of the questions presented by the very interesting paper of Judge Baldwin. It will be seen that the policy pursued in Europe differs essentially from that which we are pursuing in the United States. In Europe, a number of treaties have been arrived at, which determine in advance the method in which a conflict of law shall be determined, when two or more systems of legislations within the treaty union clash with one another, whereas, here, in our own country, the codifications undertaken by the annual conference of commissioners on uniform state legislation tend merely to reduce the number of conflicts by making legislation uniform.

It will be seen that the latter method can never hope to ameliorate conditions existing between this country and other countries of the world, because of the divergent notions prevailing there and here upon questions of public order and social justice. Under the former system, however, the clash of legislation constitutes the very basis of the solutions.

The question remains whether it is advisable for us to keep aloof from this tendency to proportion in advance the sphere of influence of each system of legislation by treaty provision. It is true that there are certain constitutional limitations which would prevent the United States from entering into concert of legislation upon this subject, which indeed in its last analysis is local in character.

I will not attempt to enter into any technical discussion upon the extent to which the Federal powers may, or may not, go in dealing with a codification of Private International Law. A most instructive paper could be written dealing with constitutional limitations upon the treaty-making power to enter into treaties with foreign countries on questions of private law in which international interests are involved. It is sufficient

[23] *Annuaire de Législation Étrangère*, XXXI, 651.